

NOT TO BE INCLUDED
IN BOUND VOLUMES

PBH
Atlanta, GA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PARAGON SYSTEMS, INC.

Employer

and

Case 10-RC-15827

UNITED SECURITY AND POLICE
OFFICERS OF AMERICA (USPOA)

Petitioner

and

INTERNATIONAL UNION, SECURITY,
POLICE & FIRE PROFESSIONALS OF
AMERICA (SPFPA)

Intervenor

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held by mail ballot from May 16, 2011 to May 31, 2011, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 101 for the Petitioner, 44 for the Intervenor, 5 against representation, and 11 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings and recommendations as modified below, and finds that a certification of representative should be issued.

1. We agree with the hearing officer's recommendation to overrule Intervenor's Objections 1 and 4, concerning inaccurate addresses on the *Excelsior* list.¹ In determining whether an objection has merit, the Board requires the objecting party to prove objectionable conduct that warrants setting aside the election. See, e.g., *Consumers Energy Co.*, 337 NLRB 752, 752 (2002). When an objection centers on alleged deficiencies in an *Excelsior* list, such as inaccurate addresses, the Board determines whether an employer has substantially complied with the rule. See *Women in Crisis Counseling*, 312 NLRB 589, 589 (1993). The Board has found an address error rate as high as 30 percent, standing alone, to be insufficient to warrant a new election. See *id.* (upholding election when 30 percent of the addresses were inaccurate); see also *Bear Truss, Inc.*, 325 NLRB 1162, 1162 (1998) (7 percent error rate insufficient to warrant a new election). In the instant case, there were approximately 336 eligible voters, and 20 addresses were alleged to be inaccurate—an error rate of approximately 6 percent.² There was no allegation or evidence suggesting that the Employer acted in bad faith or that the incorrect addresses were the result of negligence. We also note that the Employer provided telephone numbers for

¹ We do not rely on the hearing officer's discussion of *Medic One, Inc.*, 311 NLRB 464 (2000), because the parties in *Medic One* did not file exceptions on the *Excelsior* issue.

² We correct the hearing officer's error describing the inaccuracy rate as 5 percent. The rate was closer to 6 percent. For the reasons stated above, we regard that error as immaterial.

employees whose addresses were alleged to be inaccurate, and there is no evidence that the telephone numbers were inaccurate. Accordingly, we find that the Employer substantially complied with the requirements of *Excelsior* and overrule this objection.³

2. We agree with the hearing officer's recommendation to overrule Intervenor's Objection 2, which alleges that employees who were assigned to emergency FEMA work details away from home during the election period were disenfranchised. The testimony of Vernon Fields, the Employer's program manager who was in charge of assigning employees to details, establishes that 27 or 28 employees were sent on details in late April or early May 2011 and that the details lasted until sometime in May. Fields, however, was able to identify only six of the employees who went on detail and did not provide any specific end dates for their details. In addition, Datri Daniels, an employee who had been on detail, testified that her detail and that of another employee ended on May 11, 5 days before the Regional Office mailed the ballots to voters. Daniels also testified that she knew two other employees were on detail for two weeks also starting on May 4, which means they returned soon after the balloting period began. This evidence fails to demonstrate that any employee was on detail

³ The Petitioner won the election by 57 votes, so the 20 inaccurate addresses are insufficient to affect the results of the election. In any event, the Board has consistently found substantial compliance with the *Excelsior* rule even when the number of inaccurate addresses was sufficient to affect the results. See, e.g., *Bear Truss*, supra at 1162 (upholding an election when there was a two-vote differential and the *Excelsior* list contained 10 inaccurate addresses). Therefore, we reject the Intervenor's argument that the Board, in considering the cumulative effect of all of the conduct alleged as objectionable, should add the 20 employees whose addressees were inaccurate to the number of employees affected by the conduct alleged in the other objections.

during the entire balloting period, and the Intervenor offered no further evidence. We find that the Intervenor has failed to meet its burden to prove that the work details caused anyone to be disenfranchised, particularly because the Intervenor did not establish that any employee was unable to access his or her mail—and therefore unable to receive or return a ballot—during the entire balloting period. Accordingly, we overrule Objection 2.⁴

3. We agree with the hearing officer's recommendation to overrule Intervenor's Objection 3, which alleges that 23 terminated employees had grievances and unfair labor practice charges pending at the time of the election, and that those employees were disenfranchised by not being sent mail ballots.⁵ The employees were terminated before the April 14, 2011 eligibility cutoff date for failing to meet new weapons qualifications standards. On May 12, 2011, the Employer and the Intervenor finalized a settlement of the grievances (the terms of which are discussed below), and, on May 18, the Regional Director approved the parties' request to withdraw the related unfair labor practice charge. As stated above, the mail balloting period lasted from May 16 to May 31.

⁴ In overruling Objection 2, we find it unnecessary to rely on *Trustees of Columbia University*, 350 NLRB 574 (2007). Furthermore, to the extent that the Intervenor attempts to argue that the employees on detail were not able to receive campaign materials, we note that Objection 2 asserted only that the employees on temporary work assignments were disenfranchised. We also note that, just as the Intervenor has failed to establish that the detailed employees were unable to access their mail (and thus receive their mail ballots) during the balloting period, the Intervenor has not established that the detailed employees were unable to access their mail to receive the campaign materials.

⁵ Here, only 8 of the employees at issue did not receive ballots; of the 23 terminated employees, 15 requested and were sent mail ballots, and 11 of those voted under challenge.

To be eligible to vote in a mail ballot election, individuals must be employed “on both the payroll eligibility cutoff date and on the date they mail in their ballots to the Board’s designated office.” *Dredge Operators, Inc.*, 306 NLRB 924, 924 (1992) (footnote omitted). The Board allows terminated employees with grievances or other litigation pending at the time of the election to cast challenged ballots. See *Curtis Industries, Inc.*, 310 NLRB 1212, 1212-1213 (1993) (“[I]t is well established that individuals may vote by challenged ballot when their eligibility cannot be determined on the existing record.”); see also *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1365-1367 (1962), overruled in part on other grounds *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995). If the outcome of the pending grievance or litigation is a finding that the employee was terminated unlawfully and that reinstatement is appropriate, the employee will be found eligible to vote and the challenge to his or her ballot will therefore be overruled. Under such circumstances, the Board recognizes that, but for the employer's unlawful action, the employee would have remained employed throughout the eligibility period and on the date of the election and, therefore, would have been eligible to vote.

In the instant case, however, the Intervenor and the Employer settled the grievances and unfair labor practices prior to the election. There was no finding that the Employer engaged in improper conduct or that the individuals at issue were entitled to reinstatement. Instead, the terms of the settlement allowed the individuals to re-qualify for employment by establishing that they could meet the new weapons qualifications standards. None of the individuals had done so and

been reemployed prior to the eligibility cut-off date. The settlement was clear that no reemployed individual would receive backpay or accrue seniority for the lapse in employment. Therefore, because there were no grievances or other litigation pending at the time of the election, the Intervenor has failed to establish that any of the 23 terminated employees should be treated as if he or she were employed either during the payroll eligibility period or on the date the ballots were mailed or would have been mailed, and was therefore eligible to vote.

Accordingly, we overrule Objection 3.⁶

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Security and Police Officers of America (USPOA), and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and/or regular part-time armed and unarmed security officers performing guard duties as defined in Section 9(b)(3) of the Act employed by Paragon Systems, Inc., at locations assigned to federal facilities throughout the State of Georgia under the Employer's contract HSCEE4-08-A-0001 with the Department of Homeland Security, Federal Protective Service, but excluding all other employees, office clerical employees, professional employees, and supervisors as defined by the Act.

Dated, Washington, D.C., December 5, 2011.

⁶ As explained above, the Intervenor failed to prove that the employees at issue in Objections 2 and 3 were disenfranchised. But, even assuming the alleged disenfranchisement had occurred, the total number of affected employees would be insufficient to affect the election results. The Petitioner won by 57 votes. The Intervenor alleges that 28 employees were unable to vote because they were on temporary detail and that 23 terminated employees were improperly denied the opportunity to vote. Even if all of those employees—a total of 51—had voted for the Intervenor, their votes would have been insufficient to overcome the 57-vote margin.

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD